BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2017-305-E

IN RE: Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)	**RESPONSE TO SCE&G'S MOTION FOR SUMMARY JUDGMENT AND IN THE ALTERNATIVE MOTION TO STRIKE**

1. The South Carolina Office of Regulatory Staff ("ORS") submits this Reply to SCE&G's Motion for Summary Judgment and in the Alternative Motion to Strike. SCE&G's motion for summary judgment is premature because discovery is not complete and granting the motion would be contrary to the law and facts, which show the ORS testimony is not hearsay. ORS respectfully submits that it is in the interest of justice that the motion be denied.

I. PROCEDURAL HISTORY

2. This docketed matter, Docket No. 2017-305-E, was opened on September 26, 2017, when ORS filed a Request for Rate Relief to South Carolina Electric & Gas ("SCE&G") Rates Pursuant to S.C. Code Ann. § 58-27-920.

3. On August 14, 2018, ORS filed the direct testimony of Elizabeth H. Warner and M. Anthony James, including exhibits. SCE&G moved for summary judgment on September 19, 2018. ORS requested and received an extension of time to respond until October 12, 2018.

4. Discovery is ongoing in this docket and in related dockets 2017-370-E and 2017-207-E. (*See* Order Nos. 2018-81-H, 2018-82-H). ORS has previously litigated three motions to compel before the Commission, (*see* Order Nos. 2018-117-H, 2018-73-H, and 2018-141-H). The Hearing Officer has directed the parties to "meet or otherwise confer on or before October

19, 2018," to "agree as fully as possible on the admissibility of all exhibits attached to pre-filed testimony[.]" (Order No. 2018-137-H.)

II. DISCUSSION

A. Summary Judgment Premature

5. On summary judgment, the moving party bears the "burden of clearly establishing the absence of a genuine issue of material fact." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202–03 (S.C. App. 2008). "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Knight v. Austin*, 396 S.C. 518, 522, 722 S.E.2d 802, 804 (2012). A mere "scintilla of evidence" supporting the non-movant's positions will preclude summary judgment. *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (S.C. App. 2009); *Hill v. York County Sheriff's Dept.*, 313 S.C. 303, 308 (S.C. App. 1993).

6. Because summary judgment "is a drastic remedy[,]" it "must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. AT&T Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (collecting authorities); *accord Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (S.C. App. 2013). "Summary judgment is not appropriate where further inquiry into the facts is desirable to clarify application of the law." *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82 (2011); *Singleton*, 377 S.C. at 197, 659 S.E.2d at 202.

7. First, SCE&G's motion should be denied because SCE&G has not shown the required absence of disputed facts in this docket. *Singleton*, 377 S.C. at 197, 659 S.E.2d at 202. As AARP's brief points out, "SCE&G relies solely upon testimony pre-filed by ORS on August 14, 2018 in Docket No. 2017-305-E" without addressing any of the testimony filed in the

consolidated dockets. (Matter No. 278700.) Indeed, the volume of discovery "approach[es] 2 million" pages. (Matter No. 277774, James Testimony 3:18–19.) SCE&G does not even begin to attempt to address this vast universe of facts and documents, which are best addressed through a hearing.

8. Second, discovery is not complete. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543. Some half dozen depositions have been scheduled for October 2018. SCE&G cannot contend there are no factual disputes where discovery will continue to the eve of the hearing. The fact that discovery is incomplete is especially important because ratemaking is a highly fact-specific and fact-intensive determination. *See Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312–13, 313 S.E.2d 290, 291–92 (1984) (citation omitted). Although "not an exact science[,]" it requires the Commission to rely on evidence to decide "many questions of judgment and determination." *Id.* at 312, 313 S.E.2d at 291. Under these circumstances, SCE&G's motion is premature because it was filed before the close of discovery.

9. SCE&G should not be allowed to benefit from its reluctance to comply with its discovery obligations, which have delayed the progression of discovery. (*See* Order No. 2018-117-H (noting SCE&G's "actual production so far" has been "troubling" and that "SCE&G appears to be withholding documents . . . for no persuasive reason.").) Under these circumstances, there is a clear likelihood that further discovery and additional time to review discovery already conducted will uncover additional relevant evidence. *See Guinan v. Tenet Healthsystems of Hilton Head, Inc.* 383 S.C. 48, 53–54, 677 S.E.2d 32, 35–36 (S.C. App. 2009).

10. Third, SCE&G's motion is premature and conflicts with the Hearing Officer's directive that the parties to "meet or otherwise confer on or before October 19, 2018" to "agree as fully as possible on the admissibility of all exhibits attached to pre-filed testimony[.]" (Order

No. 2018-137-H.) Where the Commission has directed the parties to work diligently to resolve or define their evidentiary disagreements, SCE&G's motion creates unnecessary work for the Commission and for ORS.

B. **The Testimony Is Admissible**

11. While ORS maintains consideration of SCE&G's motion is premature, and that any evidentiary issues between the parties should be taken up at the hearing, ORS nevertheless asserts that the testimony and exhibits are admissible. While ORS reserves the right to make its complete arguments at the hearing, at least three arguments demonstrate the contested testimony is not hearsay. ORS also notes that SCE&G's blanket objection to the testimony is improper unless the Commission determines the entirety of the testimony is inadmissible. *See Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 523, 413 S.E.2d 31, 34 (1992) (citing *Johnson v. State,* 146 Ga. 190(2), 91 S.E. 42 (1916)) ("[W]here evidence is objected to in its entirety, some portion of which is admissible, such objection is not well taken").

a. Admission by Party Opponent (not hearsay)

12. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." S.C.R.E. 801(c). Statements excluded from hearsay include "the party's own statement[s]" and "statement[s] by the party's agent . . . concerning a matter within the scope of the agency" and "made during the existence of the relationship." S.C.R.E. 801(d)(2)(A), (D). An agency relationship exists where one party intends that another act on its behalf and the other accepts. *Courtney v. Remler*, 566 F. Supp. 1225, 1230 (D. S. C. 1983). SCE&G does not dispute that Bechtel completed the Bechtel report at SCE&G's behest. (*See* SCE&G's Mot. for Summ. J. and in the Alt. Mot. to Strike 5 n.1 ["Mot."].)

13. SCE&G notes that the exhibits James refers to "relate entirely to the Bechtel report." (Mot. 5.) The exhibits to James's testimony were produced by SCE&G from its own records. (James Testimony 4:13–14 & n.1.) These exhibits bear strong indicia of reliability that suggest they are exactly what they purport to be. Each of these exhibits is an admission of a party opponent under S.C.R.E. 801(d)(2). SCE&G candidly admits that it "authorized counsel to hire Bechtel," that Bechtel presented the report to SCE&G in October 2015, and that SCE&G in fact produced "the presentation and the preliminary and final Bechtel reports themselves[.]" (Mot. 5 n.1.) SCE&G cannot now claim that these documents are not what it has previously represented them to be. At the very least, SCE&G should not be permitted to attempt to write them off out-of-hand as hearsay at this early stage.

b. South Carolina Uniform Business Records as Evidence Act

14. A record of an act, condition, or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. S.C. Code § 19-5-510. The records must "be created at or near the time of the event recorded" to ensure the records are "honestly and fairly kept." *FV-I, Inc. v. Dolan*, 2017 WL 157139, at 2 (S.C. App. Jan. 11, 2017) (unpublished) (citing *S.C. Natl' Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990)). The "record custodian" is a qualified witness to "testify the evidence to be submitted under the business records exception meets the requirements of Rule 803(6), SCRE[.]" *FVI-Inc.*, 2017 WL 157139, at 2 (internal citations omitted).

15. As to the Warner exhibits, three e-mail chains and the attachments to one e-mail, SCE&G argues that "Ms. Warner advances no testimony demonstrating that these purported business records" satisfied the statutory requirements. (See Mot. 16.) SCE&G's position fails to apply the facts to the law in the light most favorable to ORS.

16. Reading Warner's testimony in the factual light most favorable to ORS, she attests that the exhibits are "true and authentic reproductions" of documents that were "stored in the regular course of business." (Warner Testimony 2:9–13.) Although Warner "did not personally participate in creating" the records, as "a record custodian," she is a qualified witness to testify that the records "meet[] the requirements of Rule 803(6), SCRE[.]" *FVI-Inc.*, 2017 WL 157139, at 2 (internal citations omitted). Warner testified that she has "personal knowledge of how the documents are stored in their regular course of business," (Warner Testimony 2:10–11), establishing her personal knowledge of the "internal procedures" by which the compilations of records are developed and kept. *See FV-I, Inc.*, 2017 WL 157139 at 2.

c. Truth of the Matter Asserted

17. The exhibits are also admissible because they are not offered only for the truth of the matter asserted. *See* S.C.R.E. 801(c). As SCE&G states, the "central issue in this docket" is "whether the rates proposed by ORS are 'fair and reasonable.'" (Mot. 15.) Whether this is so depends in no small part on whether SCE&G had good reason to believe that it should have abandoned construction at VC Summer years before it actually stopped pouring resources into the project. Testimony to show notice of a fact is not hearsay. *See Baber v. Greenville* county, 327 S.C. 31, 41, 488 S.E2d 314, 319 (1997). At a minimum, the exhibits to James's pre-filed direct testimony are admissible as evidence that SCE&G received and examined the Bechtel report, putting it on direct notice that its decisions with respect to VC Summer were questionable

at best. *See* S.C.R.E. 801(c); *Thomas v. Dootson*, 377 S.C. 293, 298–99, 659 S.E.2d 253, 256 (S.C. Ct. App. 2008).

C. **Preliminary Investigation**

18. Finally, ORS would respond to SCE&G's argument that "ORS's pre-filed direct testimony is devoid of any evidence that it has conducted a 'preliminary investigation[.]'" (Mot. 7.) In denying SCE&G's motion to dismiss, the Commission previously determined that "ORS performed a preliminary investigation as required by Code Section 58-27-920" and then directed its "Staff to schedule a hearing [on the merits] in this docket[.]" (Order No. 2017-769.) Accordingly, the Commission has previously concluded that ORS's investigation was sufficient for purposes of withstanding summary judgment. A review of the record shows this is certainly the case.

19. With regard to the Bechtel assessment of the construction completion dates, the draft and final Bechtel Reports, ORS's investigation continues to show that it was never provided the assessment or these documents. At the time of the filing of the Request for Rate Relief on September 26, 2017, ORS had the information that was divulged at the committee hearings held by the House and Senate,[1] and the public release of the final Bechtel Report at the direction of the Governor which occurred on or about September 5, 2017. In addition, ORS had the Attorney General's opinion regarding the constitutionality of the Base Load Review Act. These documents and information all formed the basis for ORS seeking a suspension of the revised rates pending a Commission finding that such evidence was sufficient. Further, at the request of the Commission, the record shows that ORS retained the accounting firm Baker Tilly Virchow Krause, LLP and bankruptcy counsel to assess the impact of the proposed rate change

[1] The VC Summer Nuclear Project Review Committee met on August 22, 2017 and September 18, 2017. Bechtel was referenced in the August 22, 2017 hearing. The House Utility Ratepayer Protection Committee met on August 23, 2017 and September 15, 2017, with information from SCE&G being provided on September 15, 2017.

on SCE&G operations. (James Testimony 7:12–19.) At a minimum, these ORS examinations of relevant SCE&G related information constitute much more than a scintilla of evidence showing ORS conducted a substantial preliminary investigation.

III. CONCLUSION

20. There is no demonstrated basis to address these claimed hearsay issues now. Any remaining evidentiary questions the parties cannot resolve for themselves prior to the scheduled hearing are best considered at trial. ORS respectfully requests that the Commission deny SCE&G's Motion in its entirety.

Respectfully submitted,

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